

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 55 (Sub-No. 775X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN CLARK, FLOYD,
LAWRENCE, ORANGE, & WASHINGTON COUNTIES, IND.

Decided: February 27, 2018

CSX Transportation, Inc. (CSXT) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon an approximately 62.3-mile rail line on its Northern Region, Louisville Division, Hoosier Subdivision between milepost 00Q 251.7, near Bedford, and milepost 00Q 314.0, near New Albany, in Clark, Floyd, Lawrence, Orange, and Washington Counties, Ind. (the Line). On January 8, 2018, notice of the exemption was served and published in the Federal Register (83 Fed. Reg. 936). The exemption is scheduled to become effective on March 12, 2018.

On February 18, 2018, Paul Didelius submitted a letter withdrawing his notice of intent to file an offer of financial assistance (OFA).¹ In response, CSXT asked that the Board confirm that the OFA process is concluded, that the effective date remains March 12, 2018, and that Mr. Didelius' notice of intent is formally withdrawn. Given the withdrawal of Mr. Didelius' notice of intent and that no other entity timely filed a notice of intent complying with the Board's regulations,² the OFA process is concluded, and the exemption's effective date remains March 12, 2018.

¹ Mr. Didelius' original notice of intent, filed on January 16, 2018, and amended on January 18, 2018, did not comply with the Board's current requirements at 49 C.F.R. § 1152.27(c)(2)(i), but he was given additional time to supplement his notice of intent to comply with the Board's regulations. CSX Transp.—Aban. Exemption—in Clark, Floyd, Lawrence, Orange & Washington Ctys., Ind., AB 55 (Sub-No. 775X), slip op. at 2 (STB served Jan. 26, 2018). Mr. Didelius filed a supplement on February 5, 2018, but later was directed to supplement that submission as well. CSX Transp.—Aban. Exemption—in Clark, Floyd, Lawrence, Orange & Washington Ctys., Ind., AB 55 (Sub-No. 775X) (STB served Feb. 14, 2018). In response, Mr. Didelius filed his February 18 letter withdrawing his notice of intent.

² Indiana Metropolitan Railway (MRY) filed a notice of intent to submit an OFA on January 17, 2018, which did not comply with the Board's current requirements at 49 C.F.R. § 1152.27(c)(2)(i). CSX Transp.—Aban. Exemption—in Clark, Floyd, Lawrence, Orange & Washington Ctys., Ind., AB 55 (Sub-No. 775X), slip op. at 2 (STB served Jan. 26, 2018). As with Mr. Didelius, MRY was given additional time to supplement its notice, which MRY did not do, instead asking for a further extension of time. Because MRY did not demonstrate good cause why a further extension was warranted, the request was denied, thus concluding MRY's

The Board's Office of Environmental Analysis (OEA) served an Environmental Assessment (EA) on January 12, 2018, recommending that one condition be imposed on any decision granting abandonment authority. In the EA, OEA noted that CSXT served a historic report on the Indiana Department of Natural Resources (SHPO), pursuant to 49 C.F.R. § 1105.8(c). OEA stated that it had not heard from the SHPO and therefore has not been able to consider the SHPO's opinion before determining if the rail line may be eligible for listing on the National Register of Historic Places. Accordingly, OEA recommended a historic preservation condition requiring the railroad to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register of Historic Places until the completion of the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed. OEA also recommended that CSXT be required to report back to OEA regarding any consultations with the SHPO and the public and that CSXT not be permitted to file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

OEA issued its final EA on February 1, 2018. The final EA notes that comments to the EA were received from the SHPO and the Miami Tribe of Oklahoma (Miami Tribe). The SHPO has requested additional information from CSXT and supports the imposition of the Section 106 condition noted above. Both the SHPO and the Miami Tribe expressed concern about historic archaeological artifacts or human remains that might be uncovered during salvage activities. Accordingly, OEA recommends a new condition to address these concerns, requiring CSXT to immediately cease all work and notify OEA, the Miami Tribe, and the SHPO in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities. Consistent with OEA's recommendation, that condition and the recommended Section 106 condition will be imposed.

In the EA, OEA stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On December 29, 2017, the Indiana Trails Fund, a non-profit corporation, filed a request for issuance of notice of interim trail use or abandonment (NITU) to negotiate with CSXT to establish interim trail use and rail banking on the Line under the National Trails Systems Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. On January 17, 2018, the City of New Albany, Ind. (New Albany), also filed a request for issuance of NITU. Pursuant to 49 C.F.R. § 1152.29, the Indiana Trails Fund and New Albany have also submitted statements of willingness to assume financial responsibility for the right-of-way and have acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In responses filed on January 4 and 17, 2018, CSXT notified the Board that it is willing to negotiate an agreement for interim trail use with the Indiana Trails Fund and New Albany.

participation in the OFA process. CSX Transp.—Aban. Exemption—in Clark, Floyd, Lawrence, Orange & Washington Ctys., Ind., AB 55 (Sub-No. 775X) (STB served Feb. 6, 2018).

Because the Indiana Trails Fund's and New Albany's requests comply with the requirements of 49 C.F.R. § 1152.29 and CSXT is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established) the relevant parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, CSXT may fully abandon the Line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The Indiana Trails Fund also has requested imposition of a public use condition for the right-of-way. The Indiana Trails Fund asks that CSXT be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The Indiana Trails Fund also asks that CSXT be prohibited from removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. The justification for its request is that these structures have considerable value for public purposes and that the 180-day period is needed to consummate a trail use agreement with CSXT.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the Indiana Trails Fund has satisfied these requirements, a 180-day public use condition will be imposed, requiring CSXT to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor, other than tracks, ties, and signal equipment, commencing from March 12, 2018, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on September 8, 2018, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until August 27, 2018. If a trail use agreement is reached for a portion of the right-of-way prior to August 27, 2018, CSXT must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the

benefit of any one potential purchaser but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, CSXT is not required to deal exclusively with the Indiana Trails Fund but may engage in negotiations with other interested persons.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Mr. Didelius' notice of intent to file an OFA is withdrawn, and the OFA process is concluded.
3. The effective date of the exemption is March 12, 2018.
4. Upon reconsideration, the notice served and published in the Federal Register on January 8, 2018, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit CSXT to negotiate with the Indiana Trails Fund and New Albany for trail use for Line for a period of 180 days from the service date of this decision and notice, until August 27, 2018. The abandonment is also subject to the conditions that CSXT shall: (1)(a) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project's right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, has been completed; (b) report back to the OEA regarding any consultations with the SHPO and the public; (c) not file its consummation notice or initiate any salvage activities related to the abandonment (including the removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; and (2) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during CSXT's salvage activities, immediately cease all work and notify OEA, the Miami Tribe, and the SHPO. OEA shall then consult with the Miami Tribe, SHPO, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.
5. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, CSXT may discontinue service. CSXT shall keep intact the right-of-way for the Line including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until September 8, 2018, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use.

If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

6. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

7. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 6 above.

8. If an interim trail use agreement is reached (and thus, interim trail use is established), the relevant parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

9. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

10. If an agreement for interim trail use/rail banking is reached by August 27, 2018, for the portion of the right-of-way subject to the NITU, interim trail use may be implemented. If no agreement is reached, CSXT may fully abandon the Line, subject to any outstanding conditions.

11. This decision and notice is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.